No. 94-270

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT P. AGUILAR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Respondent's primary argument opposing certiorari is that, in respondent's view, the Ninth Circuit's construction of 18 U.S.C. 1503 "has no continuing relevance." Br. in Opp. 16. In 1988, Congress amended another statute defining certain witness tampering offenses—18 U.S.C. 1512(b), see App., *infra*, 1a-2a—to extend it to offenses involving the "corrupt[] persuas[ion]" of witnesses.[1] Congress did not at that time amend Section 1503. Respondent acknowledges that this case presents the question "whether [respondent's] conduct

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[1] Respondent states that "corrupt[] persua[sion]"—the term added to Section 1512(b)—was "precisely the term of the omnibus clause of Section 1503 upon which the government relied to prosecute Judge Aguilar." Br. in Opp. 15-16. The term "corrupt" was and is part of the omnibus clause of Section 1503. See Pet. 2. But neither the term "persua[sion]" nor any of its variants appeared in any modern version of Section 1503.

violated Section 1503 prior to the amendment of Section 1512." Br. in Opp. 17. But respondent argues that "it hardly makes sense for the Court to revisit that issue now," because the 1988 amendments would govern future cases of this sort. *Ibid.*

Nothing in the language or legislative history of the 1988 amendment to Section 1512(b) would have any effect on a prosecution such as this one under Section 1503. The 1988 amendment simply substituted the term "threatens, or corruptly persuades" for the term "threatens" in Section 1512(b). As stated in the committee report on which respondent relies, that substitution was intended to make clear that cases of "corrupt persuasion" could and should thenceforth be brought under Section 1512(b). See Br. in Opp. 16. This, however, was not a case of "corrupt persuasion"; respondent was not alleged to have persuaded, or attempted to persuade, the FBI agents to make false statements to the grand jury. Instead, he was charged with attempting to obstruct the grand jury's investigation by making false statements to the FBI agents, with the intent that those statements be reported to the grand jury. The 1988 amendment to Section 1512(b) had nothing to do with that charge, and the question that respondent concedes is presented in this case accordingly remains an important one.

In any event, respondent's argument essentially reduces to the proposition that Congress effected a partial implied repeal of Section 1503's omnibus clause when it amended Section 1512(b) in 1988 or, perhaps, when it first enacted Section 1512(b) in 1982. As this Court has frequently explained, "[i]t is, of course, a cardinal principle of statutory construction that repeals by implication are not favored." *Randall* v. *Loftsgaarden*, 478 U.S. 647, 661 (1986); see, *e.g.*, *TVA* v. *Hill*, 437 U.S. 153, 190 (1978); *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974); *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936). Neither of the long-recognized exceptions to that rule—where there is "irreconcilable conflict" between the

two statutes or where "the later act covers the whole situation of the earlier one and is clearly intended as a substitute," see *Randall*, 478 U.S. at 661—would apply to the statutes at issue in this case. And if a partial repeal cannot be implied from the language of the statute, still less could it be implied from the comments of a congressional committee, upon which respondent places sole reliance. It is a familiar principle in the criminal law that the same conduct may constitute an offense under two distinct statutes, and the law is clear that in such a situation the government has the option of proceeding under either one. See, *e.g.*, *United States* v. *Batchelder*, 442 U.S. 114, 123-126 (1979) (citing cases); *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 45-46 (1952).

That the controversy concerning the meaning of Section 1503 remains alive is apparent from the Fourth Circuit's decision in *United States* v. *Grubb*, 11 F.3d 426 (1993). As we explain in the petition, see Pet. 18-19, the facts of *Grubb* are remarkably similar to the facts of this case: the prosecution under Section 1503 of a sitting judge for obstruction of a grand jury investigation, based on false statements he made in a tape recorded interview with FBI agents investigating corruption. The false statements at issue in *Grubb* were made on October 8, 1991, see 11 F.3d at 437, well after the 1988 amendment. Similarly, the false statements to FBI agents that formed the basis of the Section 1503 count in *United States* v. *Wood*, 6 F.3d 692 (10th Cir. 1993), occurred in 1989, see *id.* at 693, and therefore also post-dated the amendment to Section 1512(b). See Pet. 20 (discussing *Wood*).

2. Respondent asserts that the Fourth Circuit's decision in *Grubb* does not conflict with the Ninth Circuit's decision in this case, because in *Grubb* the indictment alleged that "the Grand Jury was assisted in this investigation by Special Agents of the FBI" and the evidence showed that the grand jury investigation was "being conducted through this FBI agent." Br. in Opp. 20 (quoting opinion in *Grubb*). In res-

pondent's view, those facts were not present in this case and the two cases can therefore be harmonized.

The facts of this case are virtually identical to those of *Grubb*. To be sure, the indictment in this case did not expressly allege that the FBI agents were assisting the grand jury investigation, nor is there any requirement that an indictment under Section 1503 must explain the details of the relationship between the defendant's conduct and the grand jury investigation. But there was ample evidence that the FBI agents to whom respondent made the false statements were assisting a grand jury investigation. The foreperson of the grand jury testified at trial that both of the agents to whom respondent made his false statements—Agents Carlon and Noel—appeared before the grand jury, 6 Tr. 890, and that she was "familiar" with numerous other FBI agents involved in this case, *id.* at 896. In the tape recorded conversation between Solomon and respondent on May 26, 1988, prior to respondent's interview with the FBI agents, Solomon informed respondent that FBI agents had met with him and said that "there's a grand jury goin' on now" and that "they'd be back with a subpoena for the grand jury." Resp. C.A. E.R. 39, 40.[2] In addition, one of the agents himself told respondent that "I'd have to say yes, you know, um there is a Grand Jury meeting," and that "some evidence will be heard I'm . . . I'm sure on this issue." *Id.* at 73. When respondent asked a further question about the grand jury investigation, the agent replied "I don't know if I can tell you that. I mean what's . . . is there a 6(e) rule prohibiting me from telling you that?" *Ibid.* Federal Rule of Criminal Procedure 6(e) protects the secrecy of grand jury proceedings, and the agent's statements

[2] Respondent immediately understood the significance of the grand jury investigation, commenting that "if they subpoena me I may have a problem. A real problem explaining my discussions with Judge Weigel." Resp. C.A. E.R. 43.

surely provided evidence that he was assisting the grand jury investigation.

Respondent seizes upon the Ninth Circuit's comment that "[t]here is no evidence that a grand jury had authorized or directed the FBI investigation; nor is there evidence that the FBI agents had been subpoenaed to testify," Pet. App. 18a, and argues that those comments distinguish this case from *Grubb*. Br. in Opp. 20. They do not. Ordinarily grand juries neither specifically authorize nor specifically direct FBI agents who are assisting investigations, and there was no evidence that the grand juries either in this case or in *Grubb* did so. Indeed, this Court has explained that the government has no authority to swear law enforcement agents in as "'agents' of the grand jury," and that such agents are ordinarily "aligned with the prosecutors." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 260 (1988). Nor does a grand jury ordinarily have any need to issue subpoenas to FBI agents, who can be expected to appear voluntarily when called. In short, insofar as it is of importance, the evidence in this case demonstrated that the relationship between the FBI agents and the grand jury was identical to that in *Grubb*: FBI agents were working in conjunction with the prosecutors to "assist[]" a grand jury in gathering evidence. See 11 F.3d at 436 n.15.

In any event, the *Grubb* court explained that the false statements to the FBI agents constituted obstruction of justice not because of some special and unusual relationship between the agents and the grand jury, but because the false statements were equivalent to other kinds of efforts to influence a witness to give false testimony. The Fourth Circuit explained that the defendant's conduct violated Section 1503 because his "false statements to the FBI agents are not significantly different from influencing a witness before the grand jury to give false testimony." 11 F.3d at 438. As the court stated, "[t]he effect, that of obstructing the

Grand Jury investigation, is the same." *Ibid.* The Fourth Circuit's affirmance of the Section 1503 conviction in *Grubb* is in direct conflict with the Ninth Circuit's reversal of the Section 1503 conviction in this case.

3. Respondent states that review is unwarranted in this case because the divided Ninth Circuit panel that first heard this case reversed respondent's Section 1503 conviction on other grounds. Br. in Opp. 17-18. Respondent neglects to mention that the panel opinions were withdrawn when the Ninth Circuit decided to hear the case *en banc*, see 11 F.3d 124 (1993), and that the *en banc* court of appeals expressly declined to reach the question that formed the basis of the panel's reversal of the Section 1503 conviction. See Pet. App. 25a. Respondent's speculation as to how the Ninth Circuit would resolve the knowledge issue on remand has no bearing on whether the questions now presented to this Court warrant further review.

4. In the petition, we explain that, under the plain language of Section 2232(c), the government must prove that the defendant knew that there had been an authorization or application for a wiretap; that the defendant intended to obstruct, impede, or prevent the "possible" interception for which authorization had been given or application made; and that the defendant gave notice or attempted to give notice of the possible interception. Pet. 21. We continue to believe that the additional requirement added by the court of appeals—that, at the time the defendant gave notice, the original, unextended application or authorization of which defendant had notice was in fact still in effect—is not consonant with the language of the statute and is directly contradicted by its legislative history.

Respondent errs in arguing that our interpretation of 18 U.S.C. 2232(c) "reads the phrase 'possible interception' out of the statute." Br. in Opp. 23. Our interpretation fully recognizes that the defendant has to "give notice of the

possible interception." The effect of the term "possible" in that phrase is that there need not be any actual interception occurring. For example, where the defendant merely finds out about an application for a wiretap but does not know whether it has been authorized, the statute prohibits disclosure of the "possible interception." So long as it is "possible," from the defendant's point of view, that a wiretap is occurring and the defendant gives notice with intent to obstruct it, the violation is made out.

Indeed, as we explain in the petition, although the interception need be "possible," the obstruction need not be, for there is no reason to engraft a defense of factual impossibility on to the statute. See Pet. 23 ("there is no basis in the statutory language for the court of appeals' requirement that such *obstruction* be possible at the time the disclosure was made") (emphasis added). There can be many reasons why an obstruction would not be possible, including failure of the application to be approved in the first place, malfunction of the wiretap equipment, or termination of the wiretap. See Pet. App. 26a-27a (Fernandez, J., dissenting). None of those circumstances provides a defense, where the defendant has otherwise violated the statutory prohibition, so long as the defendant "g[a]v[e] notice of the possible interception to any person who *was* or is the target of the interception." S. Rep. No. 541, 99th Cong., 2d Sess. 34 (1986) (emphasis added).[3] *A fortiori*, the fact that the wiretap has expired and then been reauthorized—as occurred in this case—at the time the defendant makes his disclosure does not constitute a defense.[4]

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[3] Respondent certainly believed that a wiretap was possible at the time he made the disclosure. See Pet. App. 25a-26a & n.2. As he stated to Solomon in a taped conversation on May 17, 1988, "Oh yeah the phone's definitely tapped. * * * Absolutely." Resp. C.A. E.R. 17.

[4] Respondent cites the court of appeals' opinion for the proposition that "[t]he wiretap application of which [respondent] allegedly was aware

Respondent appears to argue that the First Amendment protects respondent's right to disclose confidential law enforcement information he obtained in his official capacity as federal judge because "at least a substantial portion of [respondent's] suspicions about electronic surveillance arose from the fact that the government chose to conduct a public surveillance of Chapman from a car parked in front of [respondent's] house." Br. in Opp. 26 n.11. Initially, we never "acknowledged" that respondent's suspicions "arose" from his observation of the surveillance vehicle. See *Ibid.* To the contrary, the evidence at trial established that, though respondent's memory may have been jolted by his observation of the surveillance vehicle, respondent's knowledge of the electronic surveillance "arose" entirely from Judge Peckham's statement to him that he had recently reviewed a wiretap application involving Chapman.[5]

Equally important, although respondent may be correct that it would be "'highly anomalous' to punish [respondent] for

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resulted in an interception that terminated 30 days after it was begun," and that "it was never extended or reauthorized." Br. in Opp. 27. Nothing in the statute, however, requires that the wiretap be in existence at the time the disclosure was made. In any event, the dispute about the proper characterization of the history of the wiretap in this case is merely semantic. The court of appeals characterized the wiretap as having "expired" and stated that "other" wiretaps were later authorized. Pet. App. 5a. The "[o]ther" wiretaps, however, included the same telephone number and an overlapping, though changing, list of interceptees. As we characterized the same facts, the original wiretap was terminated and then was reauthorized, terminated again, reauthorized again, and then extended. See Pet. 22 n.5.

[5] Judge Peckham testified that he told respondent "that in the course of a wiretap application that the name Abie Chapman had come up." 7 Tr. 921. And respondent's nephew, who conveyed the information about the wiretap from respondent to Chapman, testified that when respondent told him about the wiretap just after having observed the FBI surveillance, respondent "did say that he had overheard at work about the possibility of [Chapman's] phone being wiretapped." 5 Tr. 825.

commenting upon activities the government chose to conduct in public," Br. in Opp. 26 n.11, the wiretap at issue in this case was not conducted in public. Had respondent merely informed Chapman that a law enforcement agent appeared to be following him, it would perhaps have constituted an error of judgment, not a criminal offense. But respondent was charged in this case with informing Chapman of the possible interception of his conversations, a fact that respondent learned in his official capacity. Nothing about the wiretap or the application was in any sense public. Indeed, Judge Peckham signed a series of orders postponing the service of notices of the wiretap on the interceptees and maintaining the secrecy of the wiretap through April 25, 1989. 7 Tr. 918-919.

5. Respondent charges that we have mischaracterized the trial record. Br. in Opp. 4-5. The facts, of course, are to be taken in the light most favorable to the verdict, which in this case was guilty on two counts. See, *e.g.*, *Evans* v. *United States*, 112 S. Ct. 1881, 1884 (1992); *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). The fact that respondent was acquitted on other charges—and, in particular, on the conspiracy charge—has no effect on that rule. That is because the basis for the acquittals cannot be known—*i.e.*, whether the jury had a reasonable doubt about a fact the government had to prove or reached its verdict through "mistake, compromise, or lenity." *United States* v. *Powell*, 469 U.S. 57, 65 (1984). Indeed, even an acquittal on the ground that the jury had a reasonable doubt as to an essential fact would not establish that the jury found that fact to be false. See *Dowling* v. *United States*, 493 U.S. 342, 348-350 (1990).

Respondent specifically identifies only two areas of alleged "mischaracterization." First, respondent states that "[c]ontrary to the implication conveyed by the government's Statement, Pet. at 6, Judge Weigel recused himself from Tham's petition * * * not because of questionable conduct by Judge Aguilar, but because of the FBI's heavy-handed intervention.

9 Tr. 1236, 1245." Br. in Opp. 8. The petition conveys no "implication" concerning this matter, because it is of no relevance to the issues before this Court. In any event, Judge Weigel did not explain his recusal as does respondent. See App., *infra*, 2a-4a.

Second, respondent states that the petition "implies incorrectly that the FBI agents made Judge Aguilar aware that a grand jury was meeting prior to eliciting the false statements." Br. in Opp. 10. In the current posture of this case, respondent's suggestion is foreclosed. The trial court instructed the jury, in connection with the Section 1503 count on which respondent was convicted, that:

> [A] grand jury proceeding is a judicial proceeding. You should first determine whether one existed at or about [June 22, 1988]. You should then determine whether or not the defendant knew of it according to the standard that I mentioned [earlier in the instructions], that he had knowledge that it was ongoing and kn[e]w about it.

10 Tr. 1532.[6] By convicting respondent, the jury therefore necessarily found that respondent knew of the ongoing grand jury investigation. There was ample support in the record for that finding, including the tape of respondent's June 22 conversation with the FBI agents, see Pet. 8, and Solomon's previous conversation with respondent, see p. 4, *supra*.

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[6] The court's reference to "the standard that I mentioned" referred back to the court's earlier general instruction that proof of a violation of Section 1503 requires "proof [that] must satisfy you *beyond a reasonable doubt unanimously* * * * that there was a pending judicial proceeding known to the defendant." 10 Tr. 1515 (emphasis added).

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For the foregoing reasons, as well as those stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

OCTOBER 1994

APPENDIX A

18 U.S.C. 1512(b) provides:

Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay or prevent the com-munication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal

offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. Cr 89-0365 LCB

UNITED STATES

v.

ROBERT P. AGUILAR

Transcript of Proceedings

August 14, 1990

Volume 9

[1245] The Court: What are the grounds upon which you believe you should have to disqualify yourself?

The Witness: Thank you, your honor. I felt I did disqualify myself and I did so for this reason:

If I denied Tham's motion for reconsideration, which it was my intention to do, but if I had done that his lawyers could have claimed I was influenced by the FBI and their investigation.

On the other hand, if I granted his motion, which I would not have done, but had I done so, the claim could have been made that I was influenced by Judge Aguilar, which I was not.

And, Your Honor, if I may, I'd like to describe to the jury how these cases arise in our court, may I do that?

The Court: Briefly.

The Witness: In our court when a case is filed, whether it's a criminal case or a civil case, there's a lottery by computer, it's assigned at the filing to one judge. If it's a case assigned to me the case will bear a number and my initials following the case.

[1246] Then the case is then that judge's for all time, for all purposes. But if, for example, the case involves something in which a judge, I or another judge who gets the case, has stock in the corporation, he disqualifies himself because it would be unfair for him to hear that case.

So for the reasons I've already indicated I disqualified myself from the Tham case and the result of that was that it goes back into the lottery and another judge's name is drawn and the judge hears the rest of the case and that's the way it works.

Q. (By Mr. Meltzer) Had Judge Aguilar done anything to you to cause you to disqualify yourself in the Tham matter, sir?

A. You mean, before I disqualified myself?

Q. Yes, sir.

A. No.

Q. And at any time did Judge Aguilar attempt to improperly influence your decision in the Tham 2255?

A. Well, not directly to me.